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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91177156
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

H-D MICHIGAN, INC., Opposer v. BRYAN BROEHM, Applicant.	Opposition No.: 91177156 Mark:  Serial No.: 78896325 Filed: May 30, 2006

OPPOSER'S REPLY BRIEF

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I. **INTRODUCTION**

Applicant Bryan Broehm ("Applicant" or "Broehm") does not dispute the fact that Harley-Davidson Motor Company Group, Inc., d/b/a Harley-Davidson Motor Company, and its related companies and affiliates (collectively "Harley-Davidson") have prior and extensive use of the HARLEY-DAVIDSON name and mark and the BAR & SHIELD Logo in connection with a wide range of products, including clothing and headwear identical to those covered by the subject application, since at least as early as 1914. Moreover, Broehm concedes that the HARLEY-DAVIDSON name and mark and the BAR & SHIELD Logo are famous and recognizable. He once again admits, among other things, that he is a Harley-Davidson owner and customer, that he attends motorcycle rallies and events, and that Harley-Davidson's famous marks were an inspiration for his own mark.

Broehm attempts to argue, however, that his mark is in the shape of a "Maltese (like) Cross" and that the banner portion of his design, although similar in placement to Harley-Davidson's BAR & SHIELD Logo, is not confusingly similar thereto because of minute differences like rounded corners. As shown below, however, the overall appearance, sound, and commercial impression of Broehm's mark are strikingly similar to Harley Davidson's marks. Not surprisingly, given Broehm's admitted use of Harley-Davidson's marks as inspiration for his own mark, Broehm acknowledges that the parties' marks (representative samples shown below) share visual similarities.

Opposer's Mark

Applicant's Mark

Without any case law or admissible evidence, Broehm devotes much of his brief to the argument that third parties have copied famous and recognizable trademarks, including Harley-Davidson's marks, and thus he should be allowed to do the same. He also argues that his mark is a "parody" of Harley-Davidson's marks, and thus the First Amendment protects his right to convey a religious message through his mark. Broehm also raises other meritless arguments for the first time in his trial brief, including an accusation that Harley-Davidson pursued this opposition because of the religious nature of his design. As detailed below, however, all of these arguments are without merit, lack evidentiary support, and are contrary to settled law.

II. ARGUMENT

A. Broehm's Evidence is Untimely and Improper and Should be Stricken

In his trial brief, Broehm relies on evidence that is the subject of Harley-Davidson's Motion to Strike (filed September 11, 2008). As detailed in that motion, and renewed in Harley-Davidson's trial brief, Broehm's evidence was untimely filed on August 27, 2008, *after* the close of his testimony period on August 26, 2008. More important, Broehm seeks to introduce evidence that cannot be filed under a notice of reliance alone. TBMP §§ 532 and 707.02(b)(2); *Boyds Collection, Ltd. v. Herrington &*

Co., 65 USPQ2d 2017 (TTAB 2003) (striking evidence as improper subject matter for submission through notice of reliance). Broehm's evidence consists of images copied from third-party websites, and images of designs that Broehm claims to intend to use that contain the mark HOLY-DIVINESON. Such evidence requires testimony to lay the foundation for its admissibility (e.g., how was it obtained, when was it obtained, by whom was it obtained, etc., and with an opportunity for cross-examination), but no such testimony has been taken by Broehm. Thus, Broehm's evidence is improper and inadmissible, and should be stricken from the record.

As an excuse for his untimely filing, Broehm argues that he experienced an "abnormal interruption" in his Internet service, which delayed the filing of his evidence. (Applicant's Br. p. 7.) However, the first page of the Board's Electronic System for Trademark Trials and Appeals ("ESTTA") located at http://estta.uspto.gov/ clearly warns: "PLAN AHEAD. Because unexpected problems can occur, you should keep filing deadlines in mind and allow plenty of time to resolve any issue which might arise." Similarly, numerous courts have held that computer problems do not excuse an untimely filing. *See Depippo v. Chertoff*, 453 F. Supp. 2d 30, 34 (D.D.C. 2006) (computer problems do not constitute excusable neglect for untimely electronic filings, particularly given the availability of renting or using another's computer); *In re Sizemore*, 341 B.R. 658, 660 (Bankr. N.D. Ind. 2006) (counsel's computer problems and technical glitches do not constitute excusable neglect).

Moreover, Broehm's alleged computer or Internet difficulties experienced on the last day of his testimony period do not excuse his delay and neglect during the entire

thirty (30) day testimony period. Nothing prevented Broehm from taking a deposition or timely filing admissible evidence *earlier* during the assigned period.

Broehm also suggests that he should be exempt from the rules of practice and procedure before the Board because he is representing himself in this matter. In particular, Broehm argues that he should not have to take a deposition in order to introduce and authenticate documentary evidence gathered by him. According to Broehm, he collected the documents himself, and thus he is "certain the TTAB can understand" that he need not depose himself to introduce and authenticate the evidence. (Applicant's Br. p. 7.)

The Board has routinely held, however, that "strict compliance with the Trademark Rules of Practice, and where applicable, the Federal Rules of Civil Procedure, is expected of all parties before the Board, whether or not they are represented by counsel." *McDermott v. San Francisco Women's Motorcycle Contingent*, 81 USPQ2d 1212 n. 2 (TTAB 2006). Thus, Broehm is not immune from the rules simply because he elected to represent himself.

Indeed, the Board has already advised Broehm at least *three times* that strict compliance with the Trademark Rules would be expected of him, even though he is not represented by counsel. First, in its June 20, 2007 Order, the Board advised Broehm to seek counsel to assist him with the technical and procedural aspects of the Trademark Rules, and then stated that "[s]trict compliance with the Trademark Rules of Practice, and where applicable the Federal Rules of Civil Procedure, is expected of all parties before the Board, whether or not they are represented by counsel." Second, months later, during its January 28, 2008 telephone conference with the parties and in its order

of that same date, the Board ruled that Broehm's unfamiliarity with the Trademark Rules could not excuse his untimely response to Opposer's motion to extend the discovery period. Third, the Board's January 28th Order also states that "**[n]o paper, document, or exhibit will be considered as evidence in the case unless it has been introduced in evidence in accordance with the applicable rules**." (Emphasis in original.)

Broehm also contends that Harley-Davidson's testimony evidence was untimely filed, and thus his untimely and improper evidence should be considered. Broehm is wrong. Harley-Davidson timely filed all of its testimony evidence, including notices of reliance and deposition transcripts. To the extent Broehm believes that Harley-Davidson's testimony deposition transcripts were untimely filed after the close of Opposer's testimony period, he misunderstands the applicable rules. The Trademark Rules clearly provide that all deposition transcripts must be filed, but the rules do not require such depositions to be filed during a party's testimony period. *See* Trademark Rules 2.123(h) and 2.125(c). As the Board noted in *Hewlett-Packard Co. v. Human Performance Measurement, Inc.*, 23 USPQ2d 1390, 1392 (TTAB 1999), the rule governing the filing of testimony deposition transcripts "is a flexible one and, as a practical matter, means that a transcript and the exhibits thereto are considered to have been promptly filed if they are submitted at any time prior to the final hearing of the case by the Board."

Finally, Broehm devotes much of his trial brief to allegations that he presents as "testimony." To the extent Broehm seeks to rely on such "testimony" in support of his case, the Board should not give his remarks any consideration or weight in this case.

Broehm's allegations, including statements concerning alleged third-party marks, are not supported by any deposition testimony or admissible documentary evidence. Moreover, Harley-Davidson has not had an opportunity to cross-examine Broehm regarding the alleged third-party marks and other "testimony." As a result, Harley-Davidson will be unduly prejudiced if the Board considers Broehm's untimely and improper evidence and allegations presented as "testimony" in his trial brief.

B. Even if the Board Considers Broehm's Untimely and Improper Evidence, it is Completely Devoid of Any Probative Value

Broehm has attempted to submit, *after* the close of his testimony period, a handful of Internet printouts and photographs allegedly showing third-party marks. As noted above, however, Harley-Davidson has filed a motion to strike such evidence as improperly and untimely filed. Thus, there is *no* evidence of record in support of Broehm's case. Moreover, even if the Board considered Broehm's evidence, he did not submit any evidence as to the *length of time* or *extent* of any use or promotion of these alleged third-party marks. Without such evidence, the Board cannot assess whether there has been *any* third-party *use*, let alone whether such use has been so widespread to have an impact on consumer perception. *7-Eleven, Inc. v. Wechsler*, 83 USPQ2d 1715, 1729 (TTAB 2007).

Broehm also argues that others have copied famous and recognizable trademarks (e.g., www.kerusso.com), including Harley-Davidson's marks, and thus he should be allowed to do the same. In making this argument, Broehm has once again acknowledged the "famous and recognizable" HARLEY-DAVIDSON names and marks and BAR & SHIELD Logo. (Applicant's Br. p. 5.) As the Court of Appeals for the

Federal Circuit has repeatedly admonished, however, "[t]here is no excuse for even approaching the well-known trademark…." *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.,* 22 USPQ2d 1453, 1456 (Fed. Cir. 1992). Moreover, even if the Board considers Broehm's evidence, a handful of alleged third-party uses on the Internet cannot justify Broehm's registration and use of mark that is confusingly similar to Harley-Davidson's famous marks. *See In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987).

C. Broehm is a Harley-Davidson Motorcycle Owner and Customer; Attends Numerous Motorcycle Functions; and Intends to Sell Identical Motorcycle Clothing Under His Harley-Davidson Inspired Mark

Broehm once again admits, among other things, that he is a Harley-Davidson owner and customer, that he attends motorcycle rallies and events, and that Harley-Davidson's famous marks were an inspiration for his own mark. (Applicant's Br. pp. 2-3, and 5.) He also acknolwedges that he has affixed a decal bearing his mark to a motorcycle helmet, and he would like to make "desirable motorcycle t-shirts." (Id. p. 2.)

Broehm does not dispute the fact that he seeks to offer and sell clothing and headwear under his mark that are identical to the products offered and sold by Harley-Davidson under its famous marks for nearly 100 years. He attempts to argue, however, that his mark is in the shape of a "Maltese (like) Cross" and that the banner portion of his design, although similar to Harley-Davidson's BAR & SHIELD Logo, is not confusingly similar thereto because of minute differences like rounded corners. (Applicant's Br. p. 2.) A fair reading of Broehm's brief confirms, however, that Harley-Davidson's marks were more than a mere inspiration for his mark. Broehm mentions

that he "did not want to copy the bar and shield design exactly," but at the same time acknowledges the marks are "similar." (Applicant's Br. pp. 2-3.) The addition of "rounded corners" does not distinguish the overall commercial impression of Broehm's mark from Harley-Davidson's famous marks. Indeed, Harley-Davidson's BAR & SHIELD Logo also has rounded corners, including the bottom rocker portion of the mark. Further, consumers viewing Broehm's mark in ordinary purchasing conditions likely will not even notice the "rounded corners," and thus presume that it is Harley-Davidson's famous BAR & SHIELD Logo. As shown below, the overall appearance, sound, and commercial impression of Broehm's mark is strikingly similar to Harley Davidson's marks (representative samples below).

			
Opposer's Mark	**Opposer's Mark**	**Opposer's Mark**	**Applicant's Mark**

D. Consumers Are Unsophisticated Because They Exercise Less Care in Purchasing Inexpensive Clothing Products, Thus Increasing a Likelihood of Confusion

Broehm suggests that consumers will be offended by Harley-Davidson's position that the relevant consumers are unsophisticated purchasers of inexpensive products. (Applicant's Br. pp. 4-5.) He argues that Harley-Davidson has not presented any evidence that the average consumers are so unsophisticated that they are incapable of distinguishing between the parties' marks and products. Broehm clearly misapprehends

the law and the fact that the "unsophisticated consumer" is one of the legal factors used by the Board and courts to analyze a likelihood of confusion.[1]

Both the Board and the Federal Circuit have held that consumers are "unsophisticated" in the sense that they exercise less care in purchasing inexpensive goods, such as clothing, thereby increasing a likelihood of confusion. *See In re Martin's Famous Pastry Shoppe, Inc.*, 223 USPQ 1289, 1290 (Fed. Cir. 1984). In this case, Broehm's application and Harley-Davidson's registrations cover clothing, headwear, jewelry, and related items that are not limited to any particular price-point or class of consumers. Thus, the Board must presume that the parties' application and registrations cover inexpensive products offered to unsophisticated consumers. *See Specialty Brands, Inc. v. Coffee Bean Distributors, Inc*., 223 USPQ 1281 (Fed. Cir. 1984).

Moreover, the evidence of record, including Scott Beck's testimonial deposition and accompanying exhibits, clearly establishes that many of Harley-Davidson's clothing products range in price from $10 to $60. (Beck Dep. 130:3-20, Ex. 34; pp. 176, 200, 430, 472, 719, 729, 738.) Likewise, Broehm acknowledges that he intends to offer "desirable motorcycle T-shirts" under his mark, which are inexpensive clothing items. (Applicant's Br. p. 2.)

[1] Harley-Davidson does not intend to offend Broehm or its consumers. Rather, Harley-Davidson simply has established that the parties' respective consumers are "unsophisticated" in the legal sense and for purposes of a likelihood-of-confusion analysis.

Accordingly, because consumers are not likely to exercise a high degree of care in purchasing such ordinary clothing and headwear products, this factor increases a likelihood of confusion.

E. Broehm's Parody and First Amendment Arguments Do Not Avoid Likelihood of Confusion

Broehm also argues that his mark is a "parody" of Harley-Davidson's marks, and thus the First Amendment protects his right to convey a religious message through his mark. According to Broehm, he seeks to offer "desirable motorcycle t-shirts" under his mark. (Applicant's Br. p. 2.) He claims to have decided to copy Harley-Davidson's BAR & SHIELD Logo to make an alleged "parody of the Harley-Davidson name" with a Christian message. (Id.)

Here, Broehm's parody argument fails on several counts. As an initial matter, both the Board and courts have determined that the First Amendment does not insulate a party from Lanham Act claims, particularly when the alleged parody is so strikingly similar to a famous mark as is the case here. *See Hard Rock Cafe Licensing Corp. v. Pacific Graphics Inc.*, 21 USPQ2d 1368 (W.D. Wash. 1991) (court rejected parody argument because defendant's HARD RAIN CAFÉ mark was found substantially similar to plaintiff's HARD ROCK CAFÉ mark); *Anheuser-Busch Inc. v. Florists Ass'n of Greater Cleveland, Inc.* 29 USPQ2d 1146 (TTAB 1993) (rejecting THIS BUD'S FOR YOU as a parody of Anheuser-Busch's mark THIS BUD'S FOR YOU for fresh-cut flowers).

In *Columbia Pictures Industries, Inc. v. Miller*, 211 USPQ 816, 820 (TTAB 1981), the Board rejected a similar parody argument because the Applicant's CLOTHES ENCOUNTERS mark for men's and women's clothing projected the same commercial

impression as Opposer's CLOSE ENCOUNTERS OF THE THIRD KIND mark for t-shirts, despite the differences between the marks. In that case, the Board observed that "[a]lthough the marks have different literal meanings, they conjure up the same thing since one is an obvious play on the other." *Id*. at 820. The Board then held that "the right of the public to use words in the English language in a humorous and parodic manner does not extend to use of such words as trademarks if such use conflicts with the prior use and/or registration of the substantially same mark by another," and found that consumers were likely to think that the applicant's goods were associated with the opposer. *Id.*

Moreover, courts have rejected parody and First Amendment arguments in trademark cases where, as here, there are alternative avenues to convey a religious or political message. In *Mutual of Omaha Ins. Co. v. Novak,* 648 F. Supp. 905, 231 USPQ 963 (D. Neb. 1986), *aff'd*, 836 F.2d 397, 5 USPQ2d 1314 (8th Cir. 1987), for example, the defendant marketed coffee mugs and T-shirts bearing the term "Mutant of Omaha" to convey a message of protest against nuclear weapons. The owner of the MUTUAL OF OMAHA mark, an insurance company, brought suit for trademark infringement, unfair competition, and trademark disparagement. In rejecting defendant's First Amendment claim, the court held:

> There are numerous ways in which [defendant] may express his aversion to nuclear war without infringing upon a trademark in the process. Just as [defendant] may not hold an anti-nuclear rally in his neighbor's backyard without permission, neither may he voice his concerns through the improper use of Mutual's registered trademark. Under these facts, the first amendment provides no defense. Here, the alleged parody is less obvious. While Novak's design may indeed amount to a satire of the plaintiff, it does not create a clear distinction as to the source of the message. The attempted parody

> does not, in this case, dispel the likelihood of confusion created by the substantially similar design employed by the defendant.

648 F. Supp. 905, 911, 231 USPQ 963, 966.

Similarly, in *Interbank Card Ass'n. v. Simms,* 431 F. Supp. 131, 193 USPQ 362 (M.D.N.C. 1977), the court rejected a First Amendment argument that is strikingly similar to the one advanced by Broehm in this case. There, defendant distributed cards and display stickers copying plaintiff's distinctive MASTER CHARGE interlocking circle design, with the added message "Give Christ Charge of Your Life." In granting plaintiff's motion for preliminary injunction, the court observed that defendant could not appropriate plaintiff's trademark where alternative methods of communication of its religious message existed. *Id.* at 133-34.

Under *Mutual of Omaha*, *Interbank*, and *Columbia Pictures*, the Board should reject Broehm's parody and First Amendment arguments. Broehm should not be allowed to blatantly copy the famous HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo to allegedly convey his religious message where there are countless alternative methods of communication for him to do so, and where the marks are so strikingly and confusingly similar.[2]

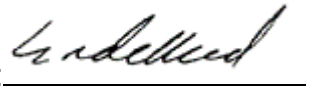
[2] Broehm contends, without any evidentiary support, that Harley-Davidson has pursued this action because of the religious nature of his design. (Applicant's Br. p. 6.) To the contrary, Harley-Davidson brought this case because it believes that Broehm's mark is likely to cause consumer confusion and dilute the distinctiveness of its marks, and thus Harley-Davidson will be damaged by the registration of the mark.

III. CONCLUSION

In view of the foregoing, Opposer respectfully requests that the opposition be sustained, and that registration of the mark of Application Serial No. 78896325 be refused.

Respectfully Submitted,

Date: January 23, 2009

By: 

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CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing OPPOSER'S REPLY BRIEF has been served upon Applicant via first class mail with postage fully prepaid on this 23rd day of January 2009, as follows:

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